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JUL 21 1993

Before the
Federal Communications Commission

In the Matter of

Implementation of Sections of the
Cable Consumer Protection and
Competition Act of 1992

Rate Regulation

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No.
92-266

To: The Commission

JOINT OPPOSITION TO PETITIONS FOR RECONSIDERATION

BEND CABLE COMMUNICATIONS, INC.
BLADE COMMUNICATIONS, INC.
MULTIMEDIA CABLEVISION, INC.
MULTIVISION CABLE TV CORP.
PARCABLE, INC.
PROVIDENCE JOURNAL COMPANY
RIVER VALLEY CABLE TV
SAMMONS COMMUNICATIONS, INC.

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

July 21, 1993

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SUMMARY

This joint opposition is filed by a number of cable operators (the "Companies") to oppose and comment on petitions for reconsideration of the Commission's Rate Regulation Report and Order. Specifically, the Companies respond to three issues raised in petitions for reconsideration.

First, the Companies urge the FCC to reject the requests of various petitioners for reduced or preferential leased access channel rates. These petitions fail to substantiate mere assertions that leased channel rates are too expensive, and that reduced rates are essential to program diversity. Indeed, the facts are to the contrary. The leased channel rates charged by one of the Companies, which are based on an implicit channel charge similar to the one adopted by the Commission, have not prevented viable programmers from leasing access. Moreover, cable television currently offers consumers the most diverse variety of programming of any distribution medium, as evidenced by the Companies' programming.

The only justifiable modification of the leased access provisions is to allow operators to charge part-time users commercially reasonable rates. The Commission's decision to simply pro-rate the full channel cost fails to account for

the true value of particular time slots and for additional administrative costs.

Second, the Companies recommend that the FCC include in Equipment Basket costs tax liability attributable to income earned by S corporations and partnerships. The Commission's revision to FCC Form 393, which excludes such costs from the Equipment Basket, unlawfully creates a substantive rule without the required notice and comment opportunities. Further, the exclusion of tax liability attributable to income of S corporations and partnerships contravenes established public utility law and runs afoul of the 1992 Cable Act's mandate that equipment charges be based on "actual costs."

Finally, the Companies urge the FCC to allow cable operators the discretion to use system-wide pricing. The restructuring of existing service rates and equipment charges consistent with the new rules can produce substantial differentials in rates among communities served by the same physically-integrated cable system. Cost analysis and pricing on a system-wide basis will greatly reduce the administrative burden of the new rules.

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JOINT OPPOSITION TO PETITIONS FOR RECONSIDERATION

Bend Cable Communications, Inc.; Blade Communications, Inc.; Multimedia Cablevision, Inc.; MultiVision Cable TV Corp.; ParCable, Inc.; Providence Journal Company;¹ River Valley Cable TV; and Sammons Communications, Inc.

("Companies"), by their attorneys and pursuant to Section 1.429 of the Commission's Rules, oppose and comment on petitions for reconsideration identified herein.²

The Companies, all cable television operators, have joined in this filing to address positions advocated by various petitioners on the following issues: (1) leased channel rates, terms and conditions; (2) instructions for calculating requirements as they pertain to Subchapter C

I. THE COMMISSION SHOULD REFRAIN FROM ESTABLISHING REDUCED OR PREFERENTIAL LEASED CHANNEL RATES FOR PARTICULAR CLASSES OF USERS

Although the Companies continue to have problems with mandatory leased access,³ they believe that the Commission's formula for determining reasonable rates for channel leasing generally is a fair and rational approach under the circumstances. As a result, the Companies strongly oppose petitions for reconsideration that propose various alternatives to the implicit channel charge approach.

Each of these petitions⁴ urges the Commission, on reconsideration, to grant preferential and significantly reduced rates to particular classes of users ranging from shopping channels, to television stations that do not qualify for must carry, to non-profit organizations. The petitions object to the rules' formulation of commercial access rates solely because the petitioners contend that they are unable

³ In joint comments in response to the Notice ("Joint Comments"), several of the companies pointed out fundamental First Amendment questions presented by the statute's concept of mandatory leased access. These problems are exacerbated when the impact of leased access is taken in combination with must carry, PEG access and other provisions of the Act and accompanying regulations that take away the operator's discretion over program content. (See, e.g., Joint Comments at 14-15.)

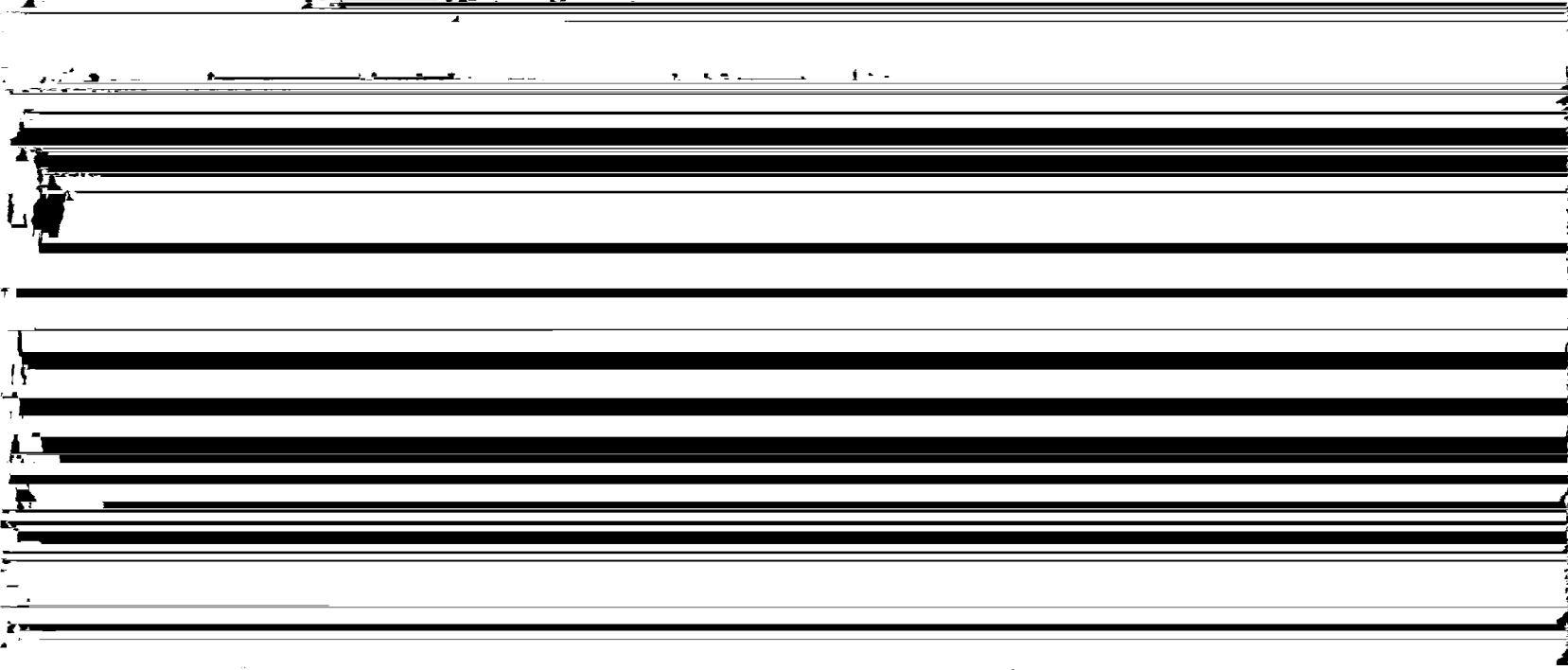
⁴ Petitions for reconsideration filed by Center for Media Education, Association of Independent Video and Filmmakers, National Associations of Artists' Organizations, National Alliance for Media Arts and Culture; Community Broadcasters Association; Engle Broadcasting; Paradise Television Network, Inc.; SUR Corporation; and ValueVision International, Inc.

to pay the rates. If channel lease rates are not lowered, they argue, program diversity will suffer. One petition even suggests that the rate should be proportional to the anticipated audience share of the programming.⁵ This petitioner apparently believes that a programmer whose service has little or no appeal to viewers should be rewarded with a valuable channel of its own for nominal rent. How this proposal serves the public interest is indeed questionable.

The petitions present no evidence that rates derived by the implicit channel charge method are unaffordable or will lead to a lack of diversity for cable viewers. The real evidence is to the contrary, as demonstrated by the Companies' experience.

A. The Rules' Leased Channel Rates Are Not Prohibitive

One of the Companies, ParCable, Inc., actually has used



Interest in commercial access was highest at a 14,000 subscriber system serving a resort area. During the past several years, the system received requests or proposals for channel leases from four programmers, all of whom intended to use the channels for an "infomercial" type visitor information service. None of these programmers had any affiliation or previous relationship with the system.

Of the four programmers that approached the system, two agreed, without question or hesitation, to pay channel lease rates derived pursuant to an implicit channel charge method. A third company offered a rate that was significantly higher without even asking the system for a quote. Two of the four original inquirers went into a second year of operation on leased channels on this system and had no problem with the channel lease fees.⁶ In addition, ParCable leased channel time to a part-time lessee, which also paid rates based on the implicit channel charge on another system.

ParCable's experience underscores the commercial reality that charges which recognize the value of cable channels are not an obstacle to programmers with realistic expectations, viable business plans, adequate financing and good

⁶ Another inquirer elected not to go forward in a market where several similar programming services would be ready to commence operations sooner. The fourth inquirer, which claimed from the beginning that it could not afford the rates and unsuccessfully attempted to obtain a lower rate through litigation, ended up leasing a channel, but has not been as successful. ParCable sold this system in June, 1993.

management. It is not the purpose of the Cable Act or the Commission's leased access rules to prop up undercapitalized ventures or to guarantee the financial success of everyone who wants to be in the programming business. Moreover, as the Joint Comments have previously pointed out,⁷ other provisions of the rules such as the must carry requirements afford channel use at no cost for broadcasters regardless of format,⁸ and PEG access channels serve as outlets for not-for-profit entities or other programmers that are not commercial enterprises. With respect to PEG access, Congress left it up to local franchising authorities to decide whether cable system revenues or other resources should be used to foster such programming.

B. Reduced Rates are Not Essential to Program Diversity

Nor are preferential or reduced rates necessary to ensure diversity of programming on cable. Cable television offers the greatest variety of programming available to consumers by any distribution medium. As the Commission is well aware, there are over 70 cable networks distributed by satellite. These include foreign language channels, religious channels, children's programming networks and a

⁷ Joint comments at 14-15.

⁸ See, e.g., Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 -- Home Shopping Station Issues, MM Docket No. 93-8 (released July 19, 1993).

tremendous variety of programming catering to other special needs and interests.

The Companies also are engaged in a variety of local programming efforts to meet the special needs of the communities they serve. Colony Communications, for example, programs an entire local channel in Spanish on its Dade County, Florida system, where the subscriber base is 85% Spanish-speaking. The channel carries news, public affairs and talk shows produced locally by the system as well as Spanish-language informational and entertainment programming. Through the auspices of a local Portuguese-language newspaper, Colony systems in the northeast also carry Portuguese language programming. In addition, Colony produces local ethnic and foreign language programming directed to the large Khmer community in one of its system's service areas. Colony's Spanish-language programming has received seven Ace Awards, its Portuguese channel has been awarded an Ace, and the company received a Distinguished Achievement Ace for its commitment to ethnic programming company-wide.

Although continued development of diverse programming certainly is an important overall goal of the Act, it is not the only goal. Nor is it clear that offering certain programmers channels at reduced rates necessarily will lead to more diverse or better programming than exists today. The

language of the leased access provision of the Act and its legislative history do, however, make it clear that leased access prices, terms and conditions must be "at least sufficient to assure that such use will not adversely affect the operation, financial condition or market development of the system." 47 U.S. C. § 612(c)(1). The FCC cannot ignore this clear mandate in an attempt to prevent a speculative harm.

C. Part-time Users Should Be Held to Commercially Reasonable Rates and Terms

The leased channel rate provisions of the rules generally are fair; however, the Commission should reconsider its position on part-time usage. The rules provide that rates for part-time usage should be a pro-rata percentage of the full channel rate.⁹ As several of the Companies pointed out in the initial phase of this proceeding,¹⁰ pro-rating the full channel cost does not reflect either the true value of particular time slots (prime time vs. off-peak viewing hours, for example), or the additional administrative, technical and lost-opportunity costs of part-time leases.

A comparison of a pro-rata hourly rate under the FCC cable rules with the typical hourly or half-hourly rate for

⁹ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Order, No. 92-266 (released April 1, 1993) ("Report and Order") at ¶ 518.

¹⁰ Joint Comments at 21.

time on a co-located TV station illustrates that simply pro-rating the price for a full channel lease significantly understates the value of cable channel time. In an average-size Top 100 TV market, for example, a half-hour of prime time on an established station sells for approximately \$1000.

Taking into account the difference in the potential audience of the station (100% of ADI) and a co-located cable system (26% of ADI), the market dictates that the cable system could charge \$260 for a half-hour in prime time. In fact, several of the Companies that base hourly rates for channel time on prevailing rates in the local TV market have a growing clientele of channel users at those rates. The hourly rate established by pro-rating the full channel lease rate for these systems -- only \$25 in the case of a system serving over 100,000 subscribers -- clearly is much lower than rates set in a market with multiple outlets available for distributing a half-hour program.

Proceeding from the legislative policy that commercial channel lease rates are to be reasonable for operators as well as programmers,¹¹ cable operators must be given greater flexibility to establish commercially reasonable rates and terms for occasional or part-time use. In most TV markets today, a market rate can be determined for hourly or half-hourly use. (In contrast, there often is no market rate for

¹¹ See 47 U.S.C. § 532(c)(4)(A)(i).

entire channels.) Thus, the implicit channel charge should be used for part-time channel leases only if the system operator cannot demonstrate a market rate.

**II. TAX LIABILITY ATTRIBUTABLE TO INCOME OF SUBCHAPTER S
CORPORATIONS AND PARTNERSHIPS SHOULD BE INCLUDED IN
EQUIPMENT BASKET COSTS**

**A. The Commission's Decision to Exclude From Equipment
Basket Costs Tax Liability Attributable to Income**

attributable to earnings of S corporations and partnerships in this manner, the FCC has adopted a substantive rule without complying with the procedural requirements set out in Section 4 of the Administrative Procedure Act ("APA").¹⁵ This significant decision, effected through a revision to FCC Form 393 without prior notice or comment, creates a binding substantive rule that is finally determinative of the rights of S corporations and partnerships under the Commission's ratemaking rules.¹⁶

The purpose of providing affected parties notice and comment opportunities is to "assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions."¹⁷ Unlike the Notice of Proposed

¹⁴(...continued)
maximum rate that operators may charge for regulated equipment and installation. Schedule A of Part III computes the capital costs associated with maintenance and installation cable equipment. Schedule C of Part III calculates the capital costs of the customer equipment. The Companies note that the Commission also proposed to exclude these taxes for S corporations and partnerships in its Notice of Proposed Rulemaking on cost of service. See Notice of Proposed Rulemaking in MM Docket No. 93-215 (released July 16, 1993) ("Cost of Service Notice") at ¶ 30 and n.32.

¹⁵ 5 U.S.C. § 553 et seq.

¹⁶ See Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 37-38 (D.C. Cir. 1977) (distinguishing substantive rules from policy decisions and interpretations).

¹⁷ Guardian Federal S. & L. v. Federal S. & L. Insurance Corp., 589 F.2d 658, 662 (D.C. Cir. 1978).

Rulemaking in the cost of service proceeding, the Commission's Notice and initial Rate Order in this proceeding contain absolutely no indication that the FCC, in formulating ratemaking rules, intended to treat S corporations and partnerships differently from other business entities, a distinction that -- as discussed below -- is contrary to both widely accepted public utility law and the plain language of the 1992 Act.

Moreover, the disallowance of taxes attributable to income of S corporations or partnerships cannot be considered anything less than the adoption of a substantive rule; hence, the absence of notice and comment opportunities cannot be justified under any "interpretive" or "policy" rule exception to the APA.¹⁸ As the D.C. Circuit has made abundantly clear, "[s]ubstantive rules are ones which 'grant rights, impose obligations, or produce other significant effects on private interests, or effect a change in existing law or policy.'"¹⁹

Without question, the Commission's decision will create a direct and irrevocable financial loss to cable firms that

¹⁸ Exceptions to the APA's procedural requirements are construed very narrowly. See, e.g., Reeder v. FCC, 865 F.2d 1298, 1305 (D.C. Cir. 1989) (quoting American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1047) (D.C. Cir. 1987)) (the "APA's procedural rule exception is to be construed very narrowly and it does not apply where the agency 'encodes a substantive value judgment.'").

¹⁹ American Hospital, 834 F.2d at 1045 (quoting Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1980)) (citations omitted).

have elected to operate as S corporations or partnerships and to their owners. While the tax liability of a typical corporation is included in its revenue requirement, the Commission does not allow taxes on earnings of S corporations or partnerships to be recovered in equipment rates, despite the fact that the shareholders of the S corporation or the partners in a partnership are liable for taxes comparable to those incurred by other corporations. Moreover, many cable firms operating as S corporations are small entities with single shareholders or family members that elect this status to avoid double taxation of, in effect, the same person.²⁰ The ability to organize as a partnership, on the other hand, can be significant in attracting equity for cable operations. The effect of the FCC's decision is to penalize small cable operators or partnerships by reducing their revenue, simply because they have elected a form of business organization that is essential or important to achieving other legitimate business objectives.

²⁰ See Moyston v. New Mexico Public Service Commission, in which the New Mexico Supreme Court reversed the PSC's exclusion of federal and state income taxes from the operating expenses of a gas utility operated as a sole proprietorship. 412 P.2d 840, 846-51 (1966). The court found no rational basis to distinguish between income taxes paid by the shareholders of S corporations and taxes paid at the corporate level because "[f]or all practical purposes, Mrs. Moyston is the Company and she is entitled to and accountable for all that pertains to its operation." Id. at 848.

**B. The FCC's Exclusion of Tax Liability Attributable to Income of S Corporations and Partnerships
Clearly Is Contrary to Accepted Public Utility Law**

The courts have considered and upheld taxes as includable expenses for Subchapter S corporations or partnerships in rate-regulated industries. Although this issue apparently has not come up in a communications context (because telephone companies rarely are organized as S corporations or partnerships), the issue has been addressed for other utilities. In fact, it is well settled that all tax liability associated with a public utility is properly included among cost of service expenses. In Galveston Electric Co. v. City of Galveston, the Supreme Court, in calculating the proper return on a utility's property, stated that "it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be paid if a fair return were earned are appropriate deductions. There is no difference in this respect between state and federal taxes or between income and other taxes."²¹

Indeed, the courts that have reviewed this issue have made clear that the income tax liability incurred by shareholders of S corporations is an unavoidable business expenditures that must be recognized as a cost of service. In Suburban Utility Corp. v. Public Utility Commission of Texas, the Supreme Court of Texas held that although the




²¹ 258 U.S. 388, 399 (1922) (emphasis added).

utility itself did not pay federal income taxes, it was entitled to a cost of service allowance for federal income taxes.²² In reaching this decision, the court reasoned that

[t]he income taxes required to be paid by shareholders of a Subchapter S corporation on a utility's income are inescapable business outlays and are directly comparable with similar corporate taxes which would have been imposed if the utility operations had been carried on by a corporation. Their elimination from cost of service is no less capricious than the excising of salaries paid to a utility's employees would be.²³

In Moyston v. New Mexico Public Service Commission, supra, the court allowed the sole proprietorship to deduct taxes as an expense, reasoning that "rates which fail entirely to take [federal and state income taxes] into account as operating expenses are unfair, unjust, unreasonable and discriminatory."²⁴

C. Exclusion of Tax Liability Attributable to Income



on operators' actual costs. Section 623(b)(3) of the 1992 Act, which provides for rate regulation of subscriber equipment, states that "[t]he regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for [installation and lease of subscriber equipment]."²⁵ The House Report further specifies that the term "actual cost" is intended to include all "normal business costs."²⁶ As discussed above, established public utility law dictates that taxes attributable to the income of S corporations are "inescapable business outlays."²⁷ The Commission's decision to exclude such normal business costs thus contravenes the plain language of the 1992 Act.

Consequently, the FCC should allow S corporations to include all income taxes attributable to the operations of S corporations (and partnerships to include taxes attributable to the operation of the partnership) as proper Equipment Basket costs. By allowing these taxes to be included in S corporations' or partnerships' revenue requirements, the Commission will ensure that all forms of legitimate business

²⁵ 47 U.S.C. § 543(b)(3) (emphasis added).

²⁶ House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 83.

²⁷ See Suburban Utility, 652 S.W.2d at 364. A similar rationale applies in the case of partnerships.

organizations will be able to recover their actual costs through equipment rates.

III. CABLE OPERATORS SHOULD HAVE DISCRETION TO USE SYSTEM-WIDE PRICING

Many of the petitions address the issue of how to make the method for establishing the benchmark and equipment rates less burdensome.²⁸ The Report and Order contemplates that rates for basic and cable programming services will be determined independently for each franchise area in which the operator provides service, even in systems which are technically integrated, which offer the same programming services and which historically and currently have a uniform system-wide rate structure.²⁹ As various petitions have pointed out, service rates calculated under the benchmark formula can vary among communities served by the same system.³⁰

²⁸ See, e.g., Continental Cablevision, Inc. at 19; Newhouse Broadcasting Corp. at 19; Viacom International Inc. at 18.

²⁹ Report and Order at ¶ 422. Footnote 1 to the instructions for the worksheets for FCC Form 393 indicates that community unit data is required except where all relevant data is identical and each franchising authority consents to the use of system data.

³⁰ Continental Cablevision, Inc. at 19; Newhouse Broadcasting Corporation at 19; Viacom International Inc. at 18.

In the course of analyzing their rate structures in preparation for the implementation of rate regulation on October 1, many cable operators will be restructuring their existing service rates and equipment charges in line with applicable benchmark rates and in the revenue-neutral manner contemplated by the Commission's Freeze Order and Freeze Clarification.³¹ For some operators, the result of that restructuring can produce dramatic differences in permissible basic and cable programming service rates among various communities served by the same system.³² For example, one of the integrated systems operated by an affiliate of MultiVision Cable TV Corp., which serves 20 separate community units, would have a rate structure ranging from:³³

	<u>Basic Service Rate</u>	<u>Cable Programming Service Rate</u>	<u>Combined Rate</u>
Maximum	\$13.26	\$11.05	\$24.31
Minimum	\$10.34	\$ 8.62	\$18.97

³¹ FCC 93-176, April 1, 1993; FCC 93-143, April 9, 1993.

³² Differences in permissible service rates are, in part, a function of revenues from ancillary equipment, such as remotes, and additional outlets which will be curtailed under the benchmark approach. To the extent those revenues are disproportionate among the communities served by the system, differentials in permissible service rates will result.

³³ Rate structure for several of MultiVision Cable TV Corp.'s multi-community systems is attached as Exhibit A.

Having established the benchmark approach as its primary and preferred method of rate regulation, the Commission is now engaged in constructing cost of service rules as an alternative for systems which are not fairly or adequately compensated under benchmarks and price caps. Noteworthy in that regard is the Commission's recognition that cost analysis may perhaps be more efficiently and appropriately conducted at the system or company level rather than at the franchise level.³⁴ While that issue will be addressed in comments in that proceeding, the parties point out that the same considerations are equally valid in the benchmark context. Moreover, to require franchise level analysis under benchmarks but to permit system level analysis under cost-of-service simply introduces an extraneous variable which, everything else being roughly equal, could incent some operators to pursue cost-of-service showings - a result which would be at odds with the Commission's stated preference for benchmarks.

The 1992 Cable Act requires the Commission, in its rate regulations, to seek to minimize the administrative burdens on cable operators³⁵; the Commission has attempted to "keep

³⁴ Cost of Service Notice at ¶¶ 60-62.

³⁵ 1992 Cable Act § 623(b)(2)(A); 47 U.S.C. § 543(b)(2)(A).

the costs of administration and compliance low."³⁶ The Companies submit that this objective can be furthered by permitting systems, at their option, to engage in system-wide pricing where the system's rates and service packages have historically been substantially similar among the various communities served.

IV. CONCLUSION

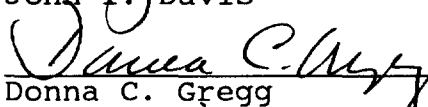
For the foregoing reasons, the Companies urge the Commission to adopt the recommendations set forth above.


Respectfully submitted,

BEND CABLE COMMUNICATIONS, INC.
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MULTIVISION CABLE TV CORP.
PARCABLE, INC.
PROVIDENCE JOURNAL COMPANY
RIVER VALLEY CABLE TV
SAMMONS COMMUNICATIONS, INC.

By:


John I. Davis


Donna C. Gregg


Michael Baker

of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Their Attorneys

July 21, 1993

Exhibit A

MultiVision Cable TV Corp.
and Affiliates

Range of combined basic and cable programming service rates
within multi-franchise, single system operations:

1.	Maryland System	\$24.31
		23.50
		22.64
		21.96
		21.82
		21.73
		21.37
		21.35
		21.18
		21.16
		21.03
		21.02
		20.81
		20.73
		20.17
		20.00
		19.78
		19.60
		19.28
		18.97
2.	Northern California System:	\$17.78
		17.72
		17.66
		17.58
		17.53
		17.49
		17.38
		17.34
		16.80
3.	Southern California Systems:	\$26.17
		23.07
		22.59
		\$19.41
		18.84

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 1993, I caused copies of the foregoing "Joint Opposition to Petitions for Reconsideration" to be mailed via first-class postage prepaid mail to the following:

J. Roger Wollenberg
William R. Richardson, Jr.
Christopher M. Heimann
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
Attorneys for VALUEVISION INTERNATIONAL, INC.

Robert J. Sachs
The Pilot House
Lewis Wharf
Boston, Massachusetts 02110
Attorney for CONTINENTAL CABLEVISION, INC.

*Richard E. Wiley
Lawrence W. Secrest, III
Philip V. Permut
William B. Baker
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for VIACOM INTERNATIONAL INC.

Henry A. Solomon
William J. Byrnes
Haley, Bader & Potts
4350 North Fairfax Dr., Suite 900
Arlington, Virginia 22203-1633
Attorneys for COMMUNITY BROADCASTERS ASSN.

Sharon L. Webber
Angela J. Campbell
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Attorneys for CENTER FOR MEDIA EDUCATION
ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS
NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS
NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE